

## **INTRODUCTION**

This Declaration of Affordable Dwelling Units Covenants (the Declaration of Covenants) must be recorded on all for-sale ADUs in a development simultaneously with and immediately following the recordation of the final subdivision plat or, in the case of a condominium, recorded simultaneously with and immediately following the condominium declaration. The ADU Notice of Availability and Offering Agreement cannot be executed until this is done. Evidence that the Declaration of Covenants document has been recorded, in the form of a copy of the applicable recorded Declaration of Covenants document, must be submitted with the ADU Offering Agreement before ADUs in a development can be sold.

The Declaration of Covenants document requires two attachments to be prepared by the developer (Declarant). Exhibit A is a legal description of the property (development) which is subject to the requirements of the ADU Ordinance. Exhibit B is a legal description of the specific lots or units within the development on which the ADUs are being (or have been) constructed.

The Declaration of Covenants document must be signed by an authorized representative of the property owner/developer, notarized and recorded in the land records of Fairfax County, Virginia.

[To be recorded immediately following the Deed of Dedication and Subdivision / Condominium  
Declaration for all for-sale affordable dwellings]  
Revised as of July 2, 2002

**DECLARATION OF AFFORDABLE  
DWELLING UNITS COVENANTS**  
(For-Sale Developments)

THIS DECLARATION OF AFFORDABLE DWELLING UNITS COVENANTS

("Declaration") is made as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by

("Declarant"), the owner of certain property ("Property") located in Fairfax County, Virginia as described on Exhibit A attached hereto and a part hereof.

**RECITALS**

**R-1.** On December 11, 1989, the Board of Supervisors of Fairfax County, Virginia established an Affordable Dwelling Unit Program, as amended and modified on March 30, 1998, and as further amended and modified on July 1, 2002 ("Program"), to assist in providing affordable housing for persons with low and moderate income.

**R-2.** The Program is intended to be administered in accordance with Part 8, Article 2 of the Fairfax County Zoning Ordinance and the regulations established with respect thereto (that ordinance, together with those regulations, as the same may be amended from time to time, are collectively referred to hereinafter as the "Ordinance").

**R-3.** The Ordinance requires, in pertinent part, that owners of certain land zoned to certain zoning districts and to be developed into fifty or more residential dwelling units shall provide a number of affordable dwelling units (collectively, the "Affordable Dwellings", each individually referred to as an "Affordable Dwelling") for sale to qualified purchasers, all in accordance with and under the conditions set forth in the Ordinance.

**R-4.** Declarant has agreed that in consideration of benefits conferred upon Declarant under the Ordinance and in compliance with Declarant's obligations under the Program,

the land described on Exhibit B attached hereto and made a part hereof, together with all improvements thereon (collectively, the "ADUs", each individually referred to as an "ADU"), shall be designated as the Affordable Dwellings on the Property in compliance with the Ordinance.

**R-5.** The Ordinance provides that no Affordable Dwellings shall be offered for sale to the general public until after the date on which all of the time periods referenced in Section 2-810 of the Ordinance have expired ("Availability Date") and the requirements therein have been fulfilled regarding the right to acquire Affordable Dwellings conferred by the Ordinance on (i) the Fairfax County Redevelopment and Housing Authority or its successor in interest ("Authority"), (ii) persons who met the income criteria established by the Authority and who had received a Certificate of Qualification from the Authority ("Certified Purchasers") in accordance with the Ordinance, (iii) any non-profit housing groups ("Non-Profit Groups") designated in writing by the County Executive of Fairfax County or the successor to such position ("County Executive"). (The period from the date hereof until the Availability Date is referred to herein as the "Initial Control Period").

**R-6.** The Ordinance establishes certain conditions, limitations and controls on the Affordable Dwellings that are to remain in effect with regard to resale and occupancy of each of the Affordable Dwellings for a period (the "Initial Resale Control Period") beginning on the date the deed of conveyance from Declarant to the first purchaser of each of the Affordable Dwellings is recorded until fifteen (15) years thereafter. In addition the Ordinance establishes certain requirements applicable during the period (the "Extended Control Period") beginning upon expiration of the Initial Resale Control Period until the first resale of each of the Affordable Dwellings after expiration of the Initial Resale Control Period, which requirements establish procedures with regard to the right of the Authority to acquire each of the Affordable Dwellings and the payment of

contributions of a portion of the proceeds from the sale of each Affordable Dwelling to the Fairfax County Housing Trust Fund. (The Initial Control Period, the Initial Resale Control Period and the Extended Control Period shall be herein collectively referred to as the "Control Periods".)

**R-7.** The Ordinance further provides that with regard to each of the Affordable Dwellings, covenants shall be recorded that will run with the land in favor of the Authority for the Control Periods and that shall specify certain terms and conditions of the Program applicable to each of the Affordable Dwellings.

**R-8.** In further compliance with the Ordinance under the terms of the Program, Declarant is making this Declaration as set forth below.

NOW, THEREFORE, Declarant hereby declares that the ADUs shall be subject to the covenants set forth herein ("Covenants") which shall be binding in accordance with the terms herein on Declarant and all Transferees of the ADUs until expiration of the applicable Control Periods. For purposes herein, Transferees shall be deemed all persons and entities that may hereafter acquire any interest whatsoever in any of the ADUs, or any part thereof, from Declarant, or any successor or assign of Declarant, or any other party, whether by sale, lease, assignment, hypothecation or any other means of transfer (any and all of the foregoing means of transfer being herein referred to as a "Transfer"), for the applicable Control Periods.

## ARTICLE I

### PRE-GENERAL SALE CONTROLS

During the Initial Control Period, no Transfer of any of the ADUs, or any part thereof, shall be made unless the Authority, the Certified Purchasers and the Non-Profit Groups shall have received the notices required by, and shall have been afforded the opportunity to purchase the ADUs in accordance with, Section 2-810 of the Ordinance.

## ARTICLE II

### ORDINANCE CONTROLS

A. During the Initial Resale Control Period, no Transfer of any of the ADUs, or any part thereof, shall be made at sales price in excess of the maximum sales price permitted pursuant to Section 2-812 of the Ordinance.

B. During the Initial Resale Control Period, no Transfer of any of the ADUs, or any part thereof, shall be made except in compliance with all other requirements of the Ordinance, including, without limitation, the obligation to offer each of the ADUs exclusively through the Authority for sixty (60) days each time any ADU is offered for sale, and the Authority shall have waived its option to acquire the ADU or the time period with respect thereto shall have expired, before offering such ADU for resale to any other party.

C. For the initial sale of any of the ADUs after expiration of the Initial Resale Control Period with respect thereto (the "First Applicable ADU Resale"), it shall first be offered exclusively to the Authority for sixty (60) days. To the extent the net sales price paid by the purchaser of the First Applicable ADU Resale, whether such purchaser is the Authority or another party if the Authority does not exercise its right to purchase after the Initial Resale Control Period as provided herein, exceeds the purchase price therefor paid by the immediate prior purchaser thereof, as such purchase price shall have been adjusted in accordance with the Ordinance, one-half (1/2) of such excess shall be contributed at the time of closing on the First Applicable ADU Resale to the Fairfax County Housing Trust Fund with the balance of such excess made available to the ADU seller.

D. During the Control Periods, each of the ADUs shall be subject to all provisions of the Ordinance.

E. During the Control Periods, this Declaration and these Covenants shall be senior to all instruments securing financing with respect to an ADU, and this Declaration and these Covenants shall be binding upon all assignees, mortgagees, purchasers and other successors in interest, except that this Declaration and these Covenants shall be released in the event of foreclosure by an Eligible Lender, as such term is defined in the next sentence, as and only to the extent provided for in Section 2-812(8)(B) of the Ordinance. An Eligible Lender is defined as an institutional lender holding a first priority purchase money deed of trust on an ADU or a refinancing of such institutionally financed purchase money deed of trust by an institutional lender, provided that such refinancing does not exceed the outstanding principal balance of the existing purchase money first trust indebtedness on the ADU at the time of refinancing.

F. During the Control Periods, every Eligible Lender and every other lender secured by an ADU or other parties who have or may seek to place a lien on any of the ADUs shall provide the County Executive and the Authority written notice of any delinquency or other event of default under the deed of trust or mortgage, or other instrument or agreement that may permit a lien to be filed against any of the ADUs, and shall offer the Authority the right to cure such delinquency or other event of default within a period of ninety (90) days immediately after receipt by the Authority of such notice, and all financing documents with respect to each of the ADUs shall so provide.

G. During the Control Periods, no sale, transfer or foreclosure of an ADU shall affect the validity of this Declaration and these Covenants, except as expressly set forth in the provisions of the Program as set forth in the Ordinance.

H. During the Control Periods, each Eligible Lender and any other lender secured by an interest in the ADU, prior to foreclosure upon an ADU, shall provide the County Executive and the Authority at least ninety (90) days prior written notice thereof.

I. During the Control Periods, the financing of each of the ADUs shall comply with all of the provisions of Section 2-812(8)(B) of the Ordinance as they may be amended from time to time. In addition to the provisions stated above in this Article II of the Declaration, during the control periods each ADU is subject to, and shall also comply with, the following in accordance with Section 2-812(8)(B) of the Ordinance:

1. The total aggregate amount of principal and accrued interest for all financing secured by an ADU shall not exceed the owner's purchase price (as adjusted in accordance with Section 2-812(2)(4) of the Ordinance). Any financing in excess of the owner's purchase price (as adjusted in accordance with Section 2-812(2)(4) of the Ordinance) shall not be secured by any interest in the applicable ADU.

2. An Eligible Lender shall have the right to foreclose on an ADU and this Declaration and these Covenants on the ADU shall terminate upon such foreclosure by the Eligible Lender in the event that the ADU is sold by a trustee on behalf of the Eligible Lender to a bonafide purchaser for value at a foreclosure sale and all the requirements of the Program as set forth in the Ordinance, this Declaration and these Covenants, and applicable regulations with respect to such foreclosure sale are satisfied. Such requirements include, but are not limited to, the Eligible Lender with respect to an ADU having provided the County Executive and the Authority written notice of the foreclosure sale proposed and having provided the Right to Cure and the Right to Acquire, as such terms are defined below.

3. Each Eligible Lender with respect to an ADU shall also provide a right to cure any delinquency or default subject to the foreclosure notice given to the County Executive and the Authority as provided in Section F above (Right to Cure), and a right to acquire an ADU subject to the foreclosure notice given to the County Executive and the Authority as provided in

Section H above (Right to Acquire). The Right to Cure and/or the Right to Acquire, as applicable, may be exercised by the Authority, or by a nonprofit agency designated by the County Executive in the event the Authority elects not to exercise its rights, at any time during such ninety (90) day period after the Authority has received notice of the delinquency or default or of the proposed foreclosure up to and including at such foreclosure sale. An ADU so acquired shall be acquired for the purpose of resale of such ADU to persons qualified under the Program and not for conversion of the ADU to a rental unit. The Right to Acquire shall entitle the Authority or the nonprofit agency designated by the County Executive to acquire the ADU at or before any foreclosure sale for which such notice has been given upon payment in full of the outstanding indebtedness on the ADU owed to the Eligible Lender including principal, interest, and fees that together in the aggregate do not exceed the amount of the owner's purchase price (as adjusted in accordance with Section 2-812(2)(4) of the Ordinance), and other reasonable and customary costs and expenses (the Outstanding First Trust Debt), and no owner, prior owner or other party, whether secured or not, shall have any rights to compensation under such circumstances.

4. In the event that neither the Authority nor the nonprofit agency designated by the County Executive exercises the Right to Acquire and the ADU is sold for an amount greater than the Outstanding First Trust Debt, one-half (1/2) of the amount in excess of the Outstanding First Trust Debt shall be paid to the Fairfax County Housing Trust Fund to promote housing affordability in Fairfax County as part of the disbursement of settlement proceeds.

5. All financing documents for financing secured by an ADU shall state that the Eligible Lender's financing provides the Right to Cure and Right to Acquire which may be exercised by the Authority, or by a nonprofit agency designated by the County Executive in the event the Authority elects not to exercise its rights, at any time during such ninety (90) day



period after the Authority has received notice, as applicable, of the delinquency or default or of the proposed foreclosure up to and including at such foreclosure sale.

J. During the Extended Control Period, no Transfer of any of the ADUs, or any part thereof, shall be made unless the Authority shall have been given the exclusive right to acquire the ADU in accordance with Section 2-812(5) of the Ordinance.

### ARTICLE III

#### PRINCIPAL DOMICILE REQUIREMENTS

Any Transferee of an ADU, except for the Authority and any nonprofit housing development agencies or corporations approved expressly in writing by the County Executive, must occupy the ADU as such Transferee's principal domicile, and must not lease or rent or permit exclusive occupancy of the ADU to any other party or parties. Each year on or within thirty (30) days prior to June 1, the owner of each ADU shall submit to the Authority, without notice or demand therefor, an affidavit executed by such owner, on form designated by the Authority, certifying such owner's continuing occupancy of the ADU.

### ARTICLE IV

#### DEED AND CONTRACT RESTRICTIONS

During the Control Periods, at the time of the sale of an ADU the owner/applicant shall provide in the sales contract for each ADU offered for sale a copy of the recorded Declaration and these Covenants running with the land in favor of the Authority. During the Control Periods, the owner/applicant shall include in the deed for each ADU sold an express statement that the ADU is subject to the terms and conditions of the Program Declaration and these Covenants recorded pursuant to the Ordinance with a specific reference to the deed book and page where such Declaration and Covenants are recorded. During the Control Periods, at the

time of any sale of an ADU, the owner/applicant shall also include in the deed for each ADU sold an express statement that the total aggregate amount of indebtedness that may be secured by the ADU is limited and that other terms and conditions apply, including, but not limited to, a right for the Authority or a nonprofit agency designated by the County Executive to acquire the ADU on certain terms in the event of a pending foreclosure sale, all as set forth in the Declaration and these Covenants and/or in the Program set forth in the Fairfax County Zoning Ordinance, as it may be amended.

## ARTICLE V

### ASSIGNMENT OF RIGHTS TO AUTHORITY

Declarant, and Declarant's heirs, successors and assigns, hereby irrevocably assigns, transfers and conveys to the Authority, and any successors thereto, all right, title and interest to enforce and maintain in full force and effect, the terms, conditions, and requirements of these Covenants.

## ARTICLE VI

### RIGHT TO ENFORCE

If the Authority shall determine that any default has occurred under these Covenants, the Authority, or its successors, may enforce these Covenants by proceeding at law, or in equity, against the persons or entities violating or attempting to violate any of the Covenants herein contained, either to restrain any violation hereof or to recover damages, including attorneys' fees and the costs of collection, or to proceed against the applicable ADU in the enforcement of any lien or obligation created by or resulting from these Covenants as allowed under Section 2-817 of the Ordinance. No remedy conferred upon or reserved to the Authority by these Covenants is intended to be exclusive of any other available remedy or remedies, but each and every such remedy is cumulative and in addition to every other remedy given under these Covenants and the

Ordinance, existing at law or equity. No delay or omission to exercise any right or power conferred under the Ordinance or hereunder, will impair any such right or power or will be construed to be a waiver thereof. Notwithstanding the foregoing, nothing herein contained, or in the Ordinance, is intended to confer on the Authority a right to invalidate a Transfer made in violation hereof, or otherwise to cause a forfeiture or reversion of title to any of the ADUs. Any liens filed pursuant to the Ordinance shall not relate back in time, but shall be effective as of the date recorded.

#### ARTICLE VII

##### BINDING ON ALL SUCCESSORS

These Covenants are binding upon the ADUs, upon the Declarant and the Declarant's heirs, successors and assigns, and upon all Transferees of title to each of the ADUs for the applicable Control Periods and shall run with the land.

#### ARTICLE VIII

##### NO AMENDMENTS

These Covenants cannot be amended, or released, unless by written instrument executed by the Authority until expiration of the Control Periods, except with respect to a foreclosure by an Eligible Lender conducted in accordance with these Covenants and the Ordinance.

#### ARTICLE IX

##### SEVERABILITY

If any provisions of these Covenants shall be held invalid or unenforceable, such holdings shall not invalidate or make unenforceable any other provision hereof.

#### ARTICLE X

HEADINGS

The headings herein are for reference purposes only and shall not affect the meaning or interpretation of the terms and conditions hereof.

IN WITNESS WHEREOF, Declarant \_\_\_\_\_ has caused this Declaration to be executed on behalf of \_\_\_\_\_.

WITNESS:

DECLARANT:

\_\_\_\_\_

COMMONWEALTH OF VIRGINIA

COUNTY OF FAIRFAX: to-wit:

The foregoing instrument was acknowledged before me in the \_\_\_\_\_ of \_\_\_\_\_, Virginia, this \_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, by

.

Notary Public

My Commission Expires: